

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LACINO HAMILTON,

Defendant-Appellant.

UNPUBLISHED
December 9, 1997

No. 193441
Recorder's Court
LC No. 94-008153

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, and possession of a weapon during the commission of a felony, MCL 750.227b; MSA 28.424(2) in the shooting death of his foster mother, Willa Bias. He was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and felony-firearm. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to consecutive prison terms of fifty to eighty years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant contends that the trial court abused its discretion by admitting the unedited preliminary examination testimony of Oliver Cowan, a witness who died before defendant's trial. Cowan testified about a conversation that he and defendant had in which defendant admitted killing his foster mother.

Former testimony of an unavailable witness is an exception to hearsay in a criminal proceeding if the defendant "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1). Prior testimony may be used by the prosecution consistent with a defendant's right to confrontation if the witness is unavailable for trial and the former testimony bears sufficient indicia of reliability. *People v Conner*, 182 Mich App 674, 680-681; 452 NW2d 877 (1990). Where there is an adequate opportunity to cross-examine the witness and counsel exercised the opportunity to do so, the transcript of the former testimony bears sufficient indicia of reliability. *Ohio v Roberts*, 448 US 56, 73; 100 S Ct 2531; 65 L Ed 2d 597 (1980); *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

In this case, defendant contends that he did not have an opportunity to develop Cowan's testimony because of the limitations placed on defense counsel's cross-examination by the magistrate. However, the instances cited by defendant do not show that counsel was denied an opportunity to develop the testimony. The record shows that defense counsel thoroughly questioned Cowan about the circumstances under which defendant purportedly confided in Cowan, the substance of the conversation, Cowan's cooperation with the investigators, whether Cowan was offered any inducements to testify, and his criminal record. The passages cited by defendant merely demonstrate that the magistrate was properly exercising control over the proceedings. The testimony was admissible under MRE 804(b)(1), and defendant was not denied his right to confront the witness.

Defendant also argues that the transcript should have been edited because portions of the testimony contained hearsay and other inadmissible evidence. The questions quoted in defendant's brief, "Did he [defendant] tell you whether he waited in the house, or did he leave?" and "Did he [defendant] use the words 'shot her?'" are not leading. Furthermore, although Cowan's testimony about his conversation with another prisoner contains several out-of-court statements, they are not being offered to prove the truth of the matter asserted and are therefore not hearsay. See MRE 801(c). The only statement arguably being used to prove the truth of the matter asserted is Cowan's statement to the prisoner, "He really did kill his foster mother." However, in light of Cowan's direct testimony that defendant admitted killing the victim, Cowan's testimony indicating that he conveyed that information to another prisoner was cumulative. Thus, even if the statement were hearsay, any error in failing to excise the testimony was harmless. See MRE 103(a).

Defendant next contends that the trial court's instructions concerning Cowan's testimony were inadequate. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

Defendant asserts that the trial court erred in refusing to give "a cautionary instruction for the uncorroborated testimony of an addict informant." The court declined defendant's request because "[t]here's nothing on the record to indicate that [the witness] was an addict." In the absence of testimony indicating that Cowan was an addict, the court did not err in refusing defendant's requested instruction.¹

With regard to defendant's remaining allegations of deficiencies in the instructions, defendant did not object at trial. Absent an objection, relief will be granted only in cases of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Having reviewed the instructions, we conclude that they adequately protected defendant's rights, and this is not a case of manifest injustice.

Defendant also argues that the jury should not have been given the transcript of Cowan's testimony to examine during deliberations because the jury was likely to attach more importance to that testimony than other testimony in the case that was not recorded. However, defendant's claim is not supported by the record. The exhibits were left on a desk, and although the jury requested the

photographs and checks, there is nothing in the file or in the transcript of the proceedings to support defendant's assertion that the transcript of Cowan's testimony was taken in the jury room. Accordingly, we need not determine whether it would have been appropriate to allow the transcript to be taken into the jury room.

Defendant next contends that the court erroneously denied his motion to have Cowan's statement to the police officers admitted into evidence. However, we have been unable to locate any place in the record where defendant so moved.² Therefore, this issue is not preserved, and we decline to address it. See *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995).

Defendant next argues that a witness, William Etta Bailey, was improperly allowed to testify that the victim was fearful and had other negative emotions about defendant. Defendant cites passages of Bailey's testimony where she states that defendant was "getting on [the victim's] nerves." Defendant did not object to this testimony on the grounds now asserted on appeal. It is well established that objections to admissibility not properly raised at trial cannot be later asserted on appeal. *People v Kilbourn*, 454 Mich 677, 685; 563 NW2d 669 (1997).

In his next issue, defendant contends that defense counsel was ineffective. Specifically, defendant asserts that defense counsel unnecessarily elicited testimony concerning prior bad acts of defendant toward the victim when there was no strategic reason to do so. Because defendant failed to move for a *Ginther*³ hearing or a new trial based on ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defendant's argument is based on the cross-examination of Bailey, a friend of the victim whose testimony was also discussed in the previous issue. Defense counsel was exploring the witness' knowledge of the relationship between defendant and the victim when counsel asked the open-ended question, "What did he do?" Bailey then testified that defendant set fires in the victim's house, put Comet into her meal, and cut wires so that when the victim mopped she would electrocute herself. After this response, counsel was successful in eliciting from Bailey that the victim never told Bailey that defendant was trying to poison or electrocute or threaten the victim since defendant was "an adult."

There is no evidence that defense counsel was aware of the attempts defendant made on the victim's life before defendant was an adult. Thus, there is no evidence that the introduction of this evidence was intentional. The issue then becomes whether counsel committed a serious error by asking the open-ended question and the subsequent manner in which he examined the witness once damaging information was revealed. Although, with the benefit of hindsight, it is clear that asking the question, "What did he do?" was a mistake, we conclude that the error was not so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment. See *People v Mitchell*, 454 Mich 145, 164-165; 560 NW2d 600 (1997). Accordingly, reversal is not required.

Defendant next argues that a check made payable to him and purportedly endorsed by the victim should not have been admitted as evidence because it was not properly authenticated as required

by MRE 901 and because the prosecutor violated the discovery order by not disclosing the existence of the check to defendant.⁴

Gary Woods, the victim's son, testified that his mother's mail was forwarded to him after her death. He received a bank statement and a canceled check for \$125 made payable to defendant, purportedly signed by the victim, and cashed by defendant. Woods testified that he had never seen his mother's name written like it was on the check to defendant. He described differences between the signature on that check and his mother's signature. We conclude that the check was properly authenticated. See MRE 901(a).⁵ Whether the signature on the check had been forged was a question for the trier of fact.

Defendant also challenges the trial court's refusal to suppress the check, despite its finding that the prosecution violated the discovery order by failing to notify defendant of the check's existence. The court determined that giving defense counsel an opportunity to speak with the witness and examine the evidence was an appropriate remedy. Defendant asserts that he could have obtained a handwriting expert to examine the signature on the check. However, defense counsel did not request additional time to obtain expert testimony at trial. Whether defendant could have obtained an expert who would have provided favorable testimony is a matter of speculation. The discovery violation in this case is not one of "the most egregious cases" where suppression is warranted. See *People v Clark*, 164 Mich App 224, 229-230; 416 NW2d 390 (1987). The court did not abuse its discretion by refusing to suppress the evidence.

Defendant argues that the evidence was insufficient to support his convictions. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

Defendant argues that the only evidence linking defendant to the crime was the testimony of Oliver Cowan, which should not have been admitted because defendant was not allowed to adequately cross-examine the witness. As previously discussed, Cowan's testimony was properly admitted. The evidence was sufficient to support defendant's convictions.

Defendant further argues that the prosecutor improperly vouched for the credibility of the witnesses and the evidence during her rebuttal argument. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). We find no miscarriage of justice. The prosecutor's remarks were not improper because there was no

implication that the prosecution had any special knowledge of the case or of the witnesses' credibility. See *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995).

In addition, defendant claims that the trial court's disparagement of defense counsel denied him a fair trial. We disagree. Defendant's brief cites only two examples of allegedly improper remarks by the trial court. In the first instance, counsel provoked the court by refusing to accept its ruling. In the second instance, the court simply urged defense counsel to finish his closing argument. We are not persuaded that these isolated comments were improper or that they denied defendant a fair and impartial trial by unduly influencing the jury. See *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989).

Finally, defendant argues that his sentence for the second-degree murder conviction is disproportionate. Defendant's reliance on the sentencing guidelines is misplaced, as the sentencing guidelines do not apply to the sentencing of habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). We conclude that defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman

¹ Whether the court should have allowed defense counsel to explore whether Cowan was an addict is a separate issue, not raised in this appeal.

² In his appellate brief, defendant cites Tr IV, pages 821 and 822. On page 821, the trial court admitted defense exhibits A and B, the prisoner registration or "floor cards" for Darnell Thompson and defendant. There are no rulings on page 822.

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

⁴ Although defendant's stated issue challenges the relevancy of the check, defendant did not argue that issue in his brief. Therefore, we deem any argument relating to the relevance of the evidence to have been abandoned. See *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995).

⁵ MRE 901(a) provides:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.